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Supreme Court, U.S.
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No. 03-955

IN THE

Supreme Court of the United States

HARRY CARMICHAEL, *et ux.*,

Petitioners,

v.

PAYMENT CENTER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The legal position set forth in the Petition for Certiorari is frivolous. The Petition argues that the court below erred when it failed to follow legal authority that has been defunct for many years. However, for purposes of correct form, Respondent offers the following statement of the issue:

Whether the deference doctrine stated in *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980) requires that courts afford deference to Federal Reserve Board interpretations of TILA which have been revoked.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Payment Center Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. FACTS

In March 2001, Payment Center, Inc. (hereafter "PCI") lent the Carmichaels $69,000 for home remodeling, which they secured through a mortgage on their home. The promissory note called for a series of 12 monthly payments of $709.74, followed by a final balloon payment of "all remaining principal and interest" in the 13th month. The Carmichaels had the option of early repayment. Both parties expected that Carmichaels would obtain refinancing at some time during the life of the loan and payoff whatever balance remained due at that time. Thus, at the time the loan was made, neither party really knew what would be its duration and an accurate final payoff figure could not be ascertained.

In an effort to comply with the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, (hereafter "TILA"), PCI submitted a TILA statement to Carmichaels that was accurate except for two glaring errors: it vastly *overstated* the finance charge as $188,716.76 on a one year loan of $69,000, and similarly overstated Carmichael's total of payments. Despite these obvious overstatements, Carmichaels elected not to shop for a better deal and executed the loan contract with PCI. Carmichaels thereafter made regular monthly payments of $709.74 until October of 2001. At that time, Carmichaels abruptly attempted to rescind the loan, demanding money damages, attorney fees and the return of all amounts paid to PCI.

B. PROCEEDINGS BELOW

PCI rebuffed these avaricious demands and Carmichaels sued, claiming that PCI violated the TILA by failing to disclose the amount of the 13th payment in violation of 15 U.S.C. § 1638(a)(6), by failing to accurately state the annual percentage rate in violation of 15 U.S.C. § 1638(a)(4), and by failing to allow Carmichaels to rescind the loan in violation of 15 U.S.C. § 1635(f). The district court dismissed all of Carmichaels' claims on PCI's motion for summary judgment. An appeal followed, and the court below affirmed.

The Petition for Certiorari seeks review of only one aspect of the proceedings below: whether PCI violated 15 U.S.C. § 1638(a)(6), as interpreted by the Federal Reserve Board, by describing the thirteenth and final payment in words, rather than in a dollar amount.

SUMMARY OF ARGUMENT

The Petition in this matter states a frivolous legal argument. The Petition is premised upon a single letter by a Federal Reserve staff attorney which is represented as authoritative. However, the letter is not authoritative, as the Federal Reserve Board has formally revoked it, and arguments based in its authority are meritless.

The Petition argues that the lower court erred when it held that Payment Center could, under current Truth in Lending laws and implementing regulations, disclose the amount of a balloon payment in a narrative description rather than in a specific dollar figure. In support of this argument, the Petition cites a single Federal Reserve staff letter, circa 1971. The Petition argues that by failing to follow the

1971 Letter, the lower court offended the deference doctrine set forth in *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980). Not only does this argument ignore the Federal Reserve's revocation of the 1971 Letter, it also ignores that the regulation addressed by the 1971 Letter has been superseded by a less stringent successor regulation, which allows for disclosures to be made in words rather than figures, under some circumstances.

Certiorari should also be denied for a more basic reason. The Petition offers no argument regarding why this case is worthy of Supreme Court review but instead merely complains of the outcome below. Moreover, the Petition actually demonstrates why this Court's review is not warranted. The Petition, in arguing that the Federal Reserve Board has the regulatory power to undo the lower court's opinion by regulation, shows that there is another, more appropriate forum in which to address the issue at hand. That forum, the Federal Reserve Board, was created for the express purpose of deciding such questions, and has undertaken efforts to address the vary issue raised by the Petition. The issue is therefore unworthy of this Court's attention.

For these reasons, the Petition should be denied.

REASONS FOR DENYING THE PETITION

I. THE SOUL AUTHORITY OFFERED IN SUPPORT OF THE PETITION HAS BEEN REVOKED AND CARRIES NEITHER BINDING NOR PERSUASIVE AUTHORITY.

A. The 1971 Letter Offered by the Petition Lacks Binding Authority.

The Petition for Certiorari in this matter materially misstates the law in as much as it offers the following Federal Reserve staff letter as binding authority:

> This is in reply to your letter of April 5, 1971, in which you inquire whether the requirement of § 226.8(b)(3) [¶ 3566] that the "amount" of the payments be shown is satisfied by the following statement where interest is computed on a simple interest basis.
>
> > $ . . . . . plus interest on December 10, 19__
> >
> > $ . . . . . plus interest on December 10, 19__
> >
> > The remaining unpaid balance plus interest on December 10, 19__ .
>
> In the staff's view, the requirement that the creditor disclose the "amount" of the payment, requires him to compute and disclose the dollar

> amount of each payment. Accordingly, the above quoted language would not meet the disclosure requirements of Regulation Z.

FRB Letter No. 469, April 19, 1971, by Griffith L. Garwood (hereafter "1971 Letter" or "Letter"). The Federal Reserve Board officially revoked the authority of this Letter and others like it when, in 1982, it replaced them with an official staff commentary to "Regulation Z", which is the regulation that the Federal Reserve has promulgated to implement TILA (generally, 12 C.F.R. § 226, *et seq.*):

> An official commentary to the regulation, to be published in the near future, will incorporate those Board and staff interpretations previously issued on [old] regulation Z that remain applicable to the new regulation. The commentary, which will be issued in the form of an official staff interpretation, will provide additional guidance regarding application of the regulation. . . .
>
> The Board and staff interpretations that have been issued under the [old] regulation will continue to be effective until April 1, 1982. . . . **Those interpretations and letters will thereafter be revoked as of that date**.

Federal Register, Vol. 46, No. 66, Tuesday, April 7, 1981, pp. 20848, 20849 (emphasis added). This excerpt makes clear that the Federal Reserve Board revoked any prior staff interpretation or letter not incorporated into the official staff commentary, effective April 1, 1982. Petitioners site no section of the current TILA, Regulation Z or FRB official staff commentary for the proposition that "amount" always

means "dollar figure". This is because there is no such language to be found. If the letter offered by Carmichaels truly stands for that proposition, then that proposition was rejected when the Federal Reserve elected not to incorporate it into Regulation Z or the official staff commentary that replaced such letters in 1982.

In light of the foregoing, it is self-evident that the opinion below could not, on the basis of the 1971 Letter, run counter to the deference doctrine set forth in *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980), as the Letter offers nothing to which the court below could have deferred. There is, therefore, no relationship between the stated issue in the Petition and those presented in the pending case of *Household Credit Servs. v. Pfennig*, 123 S. Ct. 2639 (June 27, 2003).

B. The 1971 Letter Carries no Persuasive Authority Because it Interprets a Superseded Regulation.

The 1971 Letter likewise cannot be afforded any persuasive authority because the regulation it interprets has been superseded by a less stringent regulation that was designed to make TILA compliance easier for creditors.

The Panel's opinion interprets part of Regulation Z, specifically 12 C.F.R. § 226.18(g), which tells creditors what they must disclose to consumers with respect to payment schedules of loans:

> (g) Payment Schedule. The number, amounts, and timing of payments scheduled to repay the obligation.

(1) In a demand obligation with no alternate maturity date, the creditor may comply with this paragraph by disclosing the due dates or payment periods of any scheduled interest payments for the first year.

(2) In transaction in which a series of payments varies because a finance charge is applied to the unpaid principal balance, the creditor may comply with this paragraph by disclosing the following information:

(i) The dollar amounts of the largest and smallest payments in the series.

(ii) A reference to the variations in the other payments in the series.

12 C.F.R. § 226.18(g). This regulation has been in place since Congress and the Federal Reserve substantially amended TILA and Regulation Z in 1981. Prior to the 1981 Amendments, the closest equivalent to the current § 226.18(g) to be found in Regulation Z was as follows:

226.8(b) Disclosures in sale and nonsale credit. In any transaction subject to this section, the following items, as applicable, shall be disclosed:

(3) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness and, except in the case of a loan secured by a first lien or equivalent security interest on a dwelling made to finance the purchase of that dwelling and except in the case of a sale of a dwelling, the some

> of each such payments using the term "total payments." If any payment is more than twice the amount of an otherwise regularly scheduled equal payment, the creditor shall identify the amount of such payment by the term "balloon payment" and shall state the conditions, if any, under which that payment may be refinanced if not paid when due.

Federal Register, Vol. 34, No. 28, Tuesday, February 11, 1969, p. 2008. The 1971 Letter identifies the above as precisely the section of Regulation Z that it addresses. The difference between this older version of Regulation Z and its modern counterpart is immediately apparent. As of 1971, Regulation Z did not allow payment descriptions by reference to "dollar amounts of the largest and smallest payments in the series" or to "the variations in the other payments in the series," which is the modern language upon which the court below relied. It is no wonder that a Federal Reserve staff letter dated 1971 would differ with the court below, since a materially different regulation was considered.

Any claimed persuasive authority for Carmichaels letter is further erased when one examines the reasons for the 1981 amendments to Regulation Z. The specific purpose of the 1981 amendments was to make compliance easier for creditors and to reduce the number of technical lawsuits like the one filed by Carmichaels below. About these amendments, the Federal Reserve said the following:

> The Board is adopting a complete revision of its Regulation Z. . . . The revision implements the Truth in Lending Simplification and Reform Act . . . and substantially alters the requirements and the structure of the current regulation.

* * *

> Although the Act has been revised several times since its adoption in 1968, the Simplification act marked the first concerted effort by Congress, partly on the basis of recommendations from the Federal Reserve Board, to reduce federal Truth in Lending requirements. Among its major provisions are (1) a significant reduction in consumer credit disclosures, ...
>
> * * *
>
> . . . it has become increasingly evident that the act has imposed highly complex and technical requirements on creditors, produced disclosures that sometimes obscured the important information to consumers, and generated costly and burdensome litigation over technical interpretations of the regulation.
>
> * * *
>
> The revised regulation addresses these concerns in its **emphasis on . . . reducing the number of technical disclosure burdens placed on creditors**.

Summary and Supplemental Information, Federal Register, Vol. 46, No. 66, Tuesday, April 7, 1981, p. 20848 (emphasis added). The instant case illustrates the stated purpose of the 1981 amendments. Carmichaels have based their Petition on the highly technical premise that Payment Center could only disclose the balloon payment on in a dollar figure, even though no accurate dollar figure could be ascertained.

To summarize, the 1971 Letter has been stripped of authority, and the regulation it interpreted has been superseded by a successor regulation that was made purposefully less stringent to prevent lawsuits like the one at bar. In addition, The 1971 Letter does not represent the spirit of TILA as currently formulated, and therefore is no more persuasive than it is binding. In short, it is nothing more than a relic.

The Petition for Certiorari depends entirely upon the argument that the court below should have recognized the 1971 Letter as authoritative and deferred to it in accordance with *Milhollin*. That argument is simply frivolous. The Petition for Certiorari should be denied.

II. THE PETITION HAS OFFERED NO COMPELLING REASON WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE.

Supreme Court Rule 10 notifies litigants that review on certiorari is not a mater of right, and that a petition for certiorari will be granted only for compelling reasons. Rule 10 indicates the character of those considerations which this Court is likely to find compelling. Rule 10 indicates review may be appropriate where:

> **(a)** a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial

> proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> **(b)** a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> **(c)** a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

U.S. Sup. Ct. Rule 10. The only vague effort the Petition makes to establish grounds for review is found at page 8 of the Petition, which states:

> CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI
>
> The Writ of Certiorari should be granted in this case because the U.S. Court of Appeals for the Seventh Circuit has entered a decision in defiance of the FRB's long-standing interpretation of the Truth in Lending Act, 15 U.S.C. § 1638(a)(6), and Regulation Z, 12 C.F.R. § 226.18(g), that the amount of any payment must be expressed as a dollar figure. FRB Letter No. 469 dated April 19, 1971. (Pet. App. 82a).

The 1971 Letter and the lower court's supposed defiance of it are the sole reasons offered to justify Certiorari. Because the Letter carries no persuasive or binding authority to which the court below might have deferred, no real reason for Certiorari is offered at all. The Petition for Certiorari should be denied.

III. FURTHER REVIEW IS NOT NECESSARY BECAUSE THE ISSUE AT HAND IS CURRENTLY BEING ADDRESSED IN A MORE APPROPRIATE FORUM.

The Petition for Certiorari clearly establishes that further judicial review in this case will serve no purpose. At Page 14, the Petition offers the following:

> On November 25, 2003 the Federal Reserve Board issued Regulation Z: Docket No. R-1167. (Pet. App. 47a-81a). These proposed additions to Regulation Z expressly included the rule that disclosure of "amount" is to be expressed as a numerical figure. In its commentary thereto, the FRB referenced this litigation and its disapproval of the decision below. . . .

The Petition goes on to support this statement with the following quote from the Federal Reserve Board:

> This interpretation addresses a matter discussed in a recent court decision regarding the disclosure of payments scheduled to repay a closed-end credit transaction. *See* 15 U.S.C. § 1638(a)(6); 12 C.F.R. § 226.18(g). The Board believes that the decision,

> by endorsing narrative descriptions rather than numerical amounts, may lead to confusion in disclosures.

Regulation Z: Docket No. R-1167, November 25, 2003. This information, presumably offered as proof that the court below made the wrong call, shows that the Federal Reserve Board has begun the process of deciding what the rule should be. As the Court recognized in *Milhollin*:

> Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed TILA. The Act is best construed by those who gave it substance in promulgating regulations thereunder. Furthermore, Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of the truth-in-lending law.

Id., 444 U.S. 555 at 566. Thus, both Congress and this Court have recognized that the Federal Reserve Board should be the font of TILA wisdom. Now that the Federal Reserve Board has undertaken consideration of whether final payoffs of loans should always be stated in dollars rather than descriptions, this Court should defer to that process, just as *Milhollin* requires judicial deference to the outcome of that process.

CONCLUSION

The Petition argues that *Milhollin* required the court below to treat defunct law as authoritative – a patently frivolous argument. Moreover, because the Federal Reserve Board is actively considering whether or not the rule stated in the opinion below will stand, and has the authority to decide whether it will, further review by this court will be superfluous. Finally, the Petition makes no attempt to demonstrate that the issue presented is sufficiently compelling to justify this Court's attention. For these reasons, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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